Deya Singh v. *de Cruz*[4] and *Khor Swee Khim* v. *Public Prosecutor*[5], also merit reading.

In these circumstances, acting in revision, I quashed the conviction and directed a retrial on a proper charge in contravention of section 15 subsection (1) of the Act. I also ordered that the fine, if paid, was to be refunded to the Respondent and the exhibits, to be returned to the police for necessary action.

The Public Prosecutor's appeal was, in consequence, dismissed.

Before departing I would respectfully remind the prosecution that it is essential when proceeding *de novo* to use the language of the relevant section under which the accused is charged and of the salutary advice of Thomson, J. (as he then was) in *Public Prosecutor* v. *Leong Yoon Meow*[6] that it is a very good working rule to hold that where what an accused is alleged to have done cannot be described in the language of any statutory provision creating the offence or where it seems necessary to depart from the language of the section in framing charges, then, the probability is that no offence has been committed. To the same effect is the case of *Public Prosecutor* v. *Syed Bakri*[7].

Conviction quashed; Re-trial Ordered.

Solicitors: *Cheong Lee & Ong.*

MALEB BIN SU v. PUBLIC PROSECUTOR CHEAK YOKE THONG v. PUBLIC PROSECUTOR

[A.Cr. J. (Hashim Yeop A. Sani F.J.) March 8, 1984]
[Seremban – Criminal Appeal Nos. 2 & 8 of 1984]

Administrative Law – Attorney-General, whether head of service with supervision and control over judicial officers – Whether President or Magistrate should disqualify himself from proceeding with case on ground that he belonged to a service headed by Attorney-General – Whether there was likelihood of bias – Test applied by court

Criminal Law & Procedure – Appeal – Right to appeal – Order must be final order – Dismissal of application to disqualify not proper matter for appeal – Criminal Procedure Code (F.M.S. Cap. 6), s. 307(i).

Legal Profession – Attorney-General – Whether Attorney-General head of the judicial department – Federal Constitution, arts. 132(1) & 138.

These were appeals against the dismissal by a President and a Magistrate of applications made by respective counsel at the commencement of hearing. The application was that the President or Magistrate should disqualify himself from proceeding with the case on the grounds that he belonged to a service in which the Attorney-General is said to be the head of the service. Since the Attorney-General is also the Public Prosecutor and has supervision and control of these judicial officers it was alleged that there was a likelihood of bias.

Held: (1) in the present appeals, the dismissal of the application to disqualify did not finally dispose of the rights of the accused person and the order was not a proper matter for appeal under section 307(i) of the Criminal Procedure Code;

(2) if bias is alleged (other than pecuniary or proprietary bias) then there must be proved a *real likelihood* of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficient. *A fortiori* bare allegations before hearing had hardly commenced;

(3) there is nothing in law to say that the Attorney-General is the head of the service. In fact he cannot be by virtue of Article 138 of the Constitution. Thus looking at the legal and administrative framework governing the service, the facts here did not warrant a conclusion of a real likelihood of bias;

(4) based on the foregoing, the orders made in the lower courts in Criminal Appeal Nos. 2 and 8 of 1984 should not be interfered with.

Cases referred to:

(1) *Mohammad Amin Bros* v. *The Dominion of India* A.I.R. 937) 1950 F.C. 77.
(2) *Public Prosecutor* v. *Hoo Chang Chwen* [1962] M.L.J. 284.
(3) *Public Prosecutor* v. *R.K. Menon & Anor.* [1978] 2 M.L.J. 152.
(4) *R.* v. *Huggins & Anor.* [1895] 1 Q.B. 563.
(5) *R.* v. *Altrincham Justices* [1975] 2 W.L.R. 450.
(6) *In re S (A Barrister)* [1981] 1 Q.B. 688.
(7) *Leeson* v. *General Council of Medical Education and Registration* (1889) 43 Ch.D.366, 384-385.
(8) *Healey* v. *Rauhina & Anor.* [1958] N.Z.L.R. 945.
(9) *R.* v. *Camborne Justices, Exparte Pearce* [1955] 1 Q.B.41.

CRIMINAL APPEALS.

James Ponniah, Abu Hashim bin Haji Abu Bakar, Yusof Khan bin Ghows Khan, and Seeralan Suppiah for the applicants.

Lim Beng Choon and *Phang Ah Hee* (Dy. Public Prosecutors) for the Public Prosecutor.

Cur. Adv. Vult.

Hashim Yeop A Sani F.J.: These are appeals against the dismissal by a President and a Magistrate of application made by respective counsel at the commencement of hearing. The application was that the President or Magistrate should dis-

qualify himself from proceeding with the case on the grounds that he belonged to a service in which the Attorney-General is said to be the head of the service. Since the Attorney-General is also the Public Prosecutor and has supervision and control of these judicial officers it was alleged that there was a likelihood of bias.

First, the question of the right to appeal. Under section 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by the Magistrate in a criminal case may appeal to the High Court against any such judgment, sentence or order. There is no argument, in my opinion, that the *ejusdem generis* rule applies to the word "order" which is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See discussion of this point in *Mohammad Amin Bros.* v. *The Dominion of India.*[1] The order which finally disposes of the rights of the parties should be distinguished from a purely procedural ruling. See also *Public Prosecutor* v. *Hoo Cheng Chwen*[2] and *Public Prosecutor* v. *R.K. Menon & Anor.*[3] In the former case Rose C.J. of Singapore dealt with an appeal on the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. In the latter case Ajaib J. also correctly took the view that a ruling on non-compliance with section 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

In the present appeals the dismissal of the application to disqualify did not finally dispose of the rights of the accused persons and the order is in my opinion certainly not a proper matter for appeal under section 307(i) of the Criminal Procedure Code.

However notwithstanding the absence of the right to appeal it would be desirable in my opinion to exercise my revisionary powers to dispose of the issue in these appeals on the merit since the questions involved have created some degree of uncertainty among judicial officers.

Let us now see the reasoning behind the application by counsel. It would seem clear from the record, at least in Criminal Appeal No. 8/1984, that the counsel was not alleging bias but that "there shall not be any semblance of bias". In other words what was asked was that there must appear to be impartial adjudication and the circumstances did not permit that.

It would also appear that in Criminal Appeal No. 2/1984 and No. 8/1984 the presiding officers also thought that there was a likelihood of bias arising from the "system" as they understood it. But it is noteworthy however that the learned President in Criminal Appeal No. 2/1984 gave an assurance that there would not be any bias on his part in adjudicating the case before him.

There are two tests of bias in a judicial proceeding. First whether there is actual bias. This does not apply here because there are no findings or convictions. Secondly whether there is a reasonable likelihood of bias.

In all those cases where the question of bias was in issue the appellate court was asked to quash the findings or convictions on grounds of bias. See *The Queen* v. *Huggins & Anor.*,[4] *Regina* v. *Altrincham Justices*[5] and *In re S. (A. Barrister),*[6] among others.

A person who has a judicial duty to perform should disqualify himself from performing it if he has a pecuniary interest in the decision or if he has a bias which renders him incapable of being an impartial judge. This principle was stated by Bowen L.J. in his judgment in *Leeson* v. *General Council of Medical Education and Registration.*[7] In the same case Fry L.J. took a stricter view at page 390 as follows:

> "I think that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual bias or prejudice of the judges, but that they shall be free from the suspicion of bias or prejudice."

In a situation where a likelihood of bias is alleged Lord Widgery L.J. in *Regina* v. *Altrincham Justices (supra)* said:

> "It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment ..."

I think the correct view is also clearly stated in *Healey* v. *Rauhina & Anor.*[8] following *R.* v. *Camborne Justices, Exparte Pearce*[9] in that if bias is alleged (other than pecuniary or proprietary bias)

then there must be proved a *real likelihood* of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficent. *A fortiori* bare allegations before hearing had hardly commenced.

Finally, what is the "system"which counsel said they fear would produce a likelihood of bias? The judicial and legal service is one of the public services mentioned in Article 132(1) of the Federal Constitution. The authority which exercises jurisdiction over the officers of the service in matters of promotions and discipline is the Judicial and Legal Service Commission established under Article 138 of the Constitution of which the Attorney-General is only a member. There is nothing in law to say that the Attorney-General is head of the service; in fact he cannot be by virtue of Article 138 of the Constitution. An officer belongs to the judicial and legal service but he may serve in various different capacities in the Judicial Department and Legal Department. As normal in the administrative set-up of the public service each department has its own head. And the Attorney-General is *not* the head of the Judicial Department. Thus looking at the legal and administrative framework governing the service I do not think the facts here warrant a conclusion of a real likelihood of bias. If such a conclusion is made it is not the sort of conclusion which in my opinion right thinking persons armed with the proper information and advice would entertain.

Based on the foregoing I do not think I should interfere with the orders made in the lower Courts in Criminal Appeals Nos. 2 and 8 of 1984. Legal bias has not been satisfactorily shown in both cases.

No order on revision.

Applications dismissed.

Solicitors: *Stanley Ponniah, Ng & Soo, Mahadevi Ganeshmurugan.*

BRUNEI REPORTS

TAIB BIN GEMOK v. PUBLIC PROSECUTOR

[A.Cr.J. (Rhind J.) March 30, 1982]
[Bandar Seri Begawan – Criminal Appeal No. 1 of 1982]

Road Traffic – Driving without licence, third party insurance policy and permission of owner of vehicle – Accused, policeman aged 18 years 10 months – Fine of $250 substituted for custodial sentence of 2 months' imprisonment – Motor Vehicle Insurance (Third Party Risks) Enactment (Cap. 90), s.3(1) – Road Traffic Enactment, 1954, ss. 16 & 34(2)

Criminal Law & Procedure – Sentencing – Offence of driving without licence, third party insurance policy and permission of owner of car – Mitigating circumstances – Fine of $250 substituted for custodial sentence of 2 months' imprisonment – Motor Vehicle Insurance (Third Party Risks) Enactment (Cap. 90), s.3(1) – Road Traffic Enactment, 1954, ss. 16 & 34(2).

The appellant pleaded guilty in the Magistrate's Court on 3 charges, viz., driving a vehicle (a) without a licence contrary to section 16 of the Road Traffic Enactment 1954, (b) without a valid third party insurance policy contrary to section 3(1) of the Motor Vehicle Insurance (Third Party Risks) Enactment (Cap. 90), and (c) without the consent of the owner contrary to section 34(2) of the Road Traffic Enactment.

At the time of committing the offences, the appellant was 18 years and 10 months old. He was a police constable.

On the charge of driving without a licence, he was fined $100/- or in default 10 days; on the uninsured driving charge the sentence was two months' imprisonment plus twelve months' disqualification and on the charge of taking and driving away he was fined $100/- or 10 days in default. The appellant appealed against the term of imprisonment.

Held, allowing the appeal: (1) in terms of penalties for criminal offences, a maximum sentence of 6 months' imprisonment and a fine of $1,000/- is indicative that the legislature does not regard an offence as being one of high order of gravity, and for such an offence it would normally only be in a situation where there were aggravating circumstances that a court would take the step of sending an offender, particularly a first offender, to prison. For offences under this section, a prison sentence should be the exception, at least for first offenders;

(2) in the present case, a sentence of imprisonment was wholly wrong in principle. A fine of $250/- should be substituted for the term of imprisonment and the appellant should be disqualified from applying for licences to drive any class of vehicle for a period of 12 months.

Case referred to:

(1) *Public Prosecutor* v. *Hamdan bin Tahir* Revision Order No. 4 of 1981.

Obiter dictum: "The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison